UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 15 Cr. 643 (PKC)

GARY HIRST,

Defendant.

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September 27, 2016
10:00 a.m.

Before:

HON. P. KEVIN CASTEL

District Judge
and a Jury

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BY: BRIAN R. BLAIS
AIMEE HECTOR
REBECCA G. MERMELSTEIN
Assistant United States Attorneys

SHER TREMONTE LLP
Attorneys for Defendant
BY: MICHAEL TREMONTE
JUSTINE A. HARRIS
NOAM KORATI BIALE

ALSO PRESENT:
SPECIAL AGENT SHANNON BIENIEK, FBI
ELLIE SHEINWALD, Paralegal
GARY SMITH, Paralegal
RYAN POLLOCK, Paralegal

(At 10:00 a.m., the jury retired to deliberate)

(Jury not present)

THE COURT: One or two housekeeping matters. Can you both confirm that your sides' exhibits were verified and went into the jury room?

MS. MERMELSTEIN: Yes. Although there's one housekeeping matter on that that we wanted to put before your Honor.

THE COURT: Related to the exhibits or the table of contests to the exhibits?

MS. MERMELSTEIN: The exhibits.

THE COURT: What's the housekeeping matter?

MS. MERMELSTEIN: In going through everything, we discovered a typo in a stipulation. So an exhibit that was shown to the jury and discussed with the jury in which the parties had intended to stipulate to was not listed in the stipulation. It's gone back to the jury with the agreement of both parties, and as your Honor has suggested, we've created a 1514R2 that is corrected and includes a missing exhibit which was 1090. We have not dated it, and signed it with a backslash S by both parties, and so that's our proposal to fix the typographical error.

THE COURT: That the stipulation and also the exhibit, or just the stipulation would go in?

MS. MERMELSTEIN: The exhibit is already included with the exhibits that have gone back. This stipulation corrects the record in which it wasn't formally offered, although it was in the exhibit binders that the jury had, was discussed and shown --

THE COURT: Any objection from the defendant?

MS. HARRIS: No, your Honor.

THE COURT: So that will go back. I take it there was agreement as to the table of contents and they have gone back to the jury; is that correct?

MS. MERMELSTEIN: Yes, your Honor.

MS. HARRIS: Yes, your Honor.

THE COURT: There was a note which was shown to both sides. 11:55 a.m. "May we have a table of contents for both government and defendant's exhibits?" Can you confirm that you saw and reviewed this note?

MS. MERMELSTEIN: We did not, your Honor.

THE COURT: I apologize. My instructions were that counsel were to see the notes.

MS. MERMELSTEIN: We got the gist of the message and we responded appropriately.

THE COURT: Madam Deputy, if you will show the note to both sides.

Is there anything further that needs to be done with regard to the note which is marked as Court Exhibit 12?

MS. MERMELSTEIN: The table of contents note?

THE COURT: Yes.

MS. MERMELSTEIN: No, your Honor.

THE COURT: Ms. Harris?

MS. HARRIS: No, your Honor.

THE COURT: There's a note which has been marked as Court Exhibit 13. "Your Honor, may we listen to the testimony of Arthur Laby? Please and thank you." Show the note, if you will, to counsel.

MS. MERMELSTEIN: We've seen it, your Honor.

THE COURT: All right, great. I understand there is a disagreement; is that correct?

MS. MERMELSTEIN: There is, your Honor. We agree on most of the redactions that were appropriate, and we've sent Ms. Sheinwald downstairs to start redacting the transcript on the points of agreement. I think the points of disagreement is two-fold. First, on page 201 of the transcript, I've forgotten who was doing the cross examination. Mr. Tremonte began an examination that suggested that there was somehow -- that because the witness had not been qualified as an expert, there was some deficiency in his testimony. Your Honor sustained the objection to that line of questioning on page 202. There was then one more question, Mr. Blais objected, and it was sustained, and then your Honor gave a curative instruction concerning the witness's testimony.

In the government's view, and in keeping with the redactions that we've all agreed on in the other sections of the transcript, the testimony ought to be struck from page 201, line 15, which begins the cross examination concerning the expert or nonexpert nature of the testimony, to which your Honor sustained, I think your Honor's own objection all the way through page 202, including your Honor's curative instruction, which, in the government's view, in light of striking the improper questioning, is no longer necessary. Then, as your Honor will recall, there was --

THE COURT: Where was your objection made?

MS. MERMELSTEIN: Your Honor, I think, sustained your own objection on page 202, line 10.

THE COURT: Okay.

MS. MERMELSTEIN: Then Mr. Tremonte asked one similar question, to which Mr. Blais objected, and that objection was sustained. Then your Honor gives the curative instruction starting on line 17.

MS. HARRIS: Just to cut to the chase a little bit, your Honor, we agree with the redaction of the testimony beginning on page 201, line 15.

THE COURT: Yes.

MS. HARRIS: We agree that all of that line of questioning should come out, through page 202, line 16 where we disagree -- we think the curative instruction doesn't just relate to that line of questioning, but it relates really to the entire -- I mean, Mr. Laby, as the Court recalls, was a summary witness.

THE COURT: 202, line 16, you agree.

MS. HARRIS: Correct.

THE COURT: So there's no dispute that 201, line 15 to 202, line 16 should be out; is that correct?

MS. HARRIS: That's correct.

THE COURT: Is that correct, Ms. Mermelstein?

MS. MERMELSTEIN: Yes, your Honor.

THE COURT: Go ahead, Ms. Harris.

MS. HARRIS: So it's just lines 17 to 23 on page 202, your Honor's limiting instruction, curative instruction which we think is part and parcel of the testimony they heard. And to the extent they're rehearing the testimony, the instruction is germane and part of their understanding of the testimony, and we think relevant. I mean, the line of questioning was really -- because it is this blurry, close line between summary and expert, and I think the line of questioning, which was objected to and sustained, the objection was directed to the entire line of questioning and the notion of whether or not he was an expert or just describing the law or the rules as they exist in the world, and I think your Honor's instructions address that whole notion.

THE COURT: What's the government's position and what is the perceived harm in the instruction going to the jury?

MS. MERMELSTEIN: Your Honor, I think that the defense question, trying to suggest to the jury that the witness was somehow less qualified as a witness because he hadn't been qualified as an expert, was misleading to the jury, especially in light of the situation we were in, which is that he certainly was qualified to be qualified as an expert, and because his testimony that was being offered was factual testimony in its nature, the government didn't so seek. I think that the curative instruction your Honor gave was not in any fashion addressed to the nature of the witness's testimony, to the contrary, it's very clear from the transcript, and of course we were all there, that it was a curative instruction designed to clarify for the jury the misleading nature of the defense questions to this witness.

I think that taking out the questions and leaving in -- and certainly, I think the questions are improper so they should be out -- but leaving in the instruction is confusing, and I think that, notwithstanding the efforts to explain to the jury by your Honor what that was all about, the suggestion somehow that this witness can't offer an opinion, but, of course, there are other witnesses in the trial who did, I think suggests incorrectly to the jury that there is something less qualified about this witness than other witnesses, which, of course, couldn't be further from the truth. So I don't see any purpose in leaving in that instruction.

THE COURT: Is there anything further, Ms. Harris?

MS. HARRIS: Your Honor, look. I don't think the notion of who is certified officially as an expert is clear to the jury, and certainly the government credentialed Mr. Laby as if he was an expert. And he did talk about issues like materiality, so I do think this instruction is important since the jury is going to rehear, and it risks prejudice or confusion on the other end.

THE COURT: I've reviewed the Laby cross examination, and specifically the referenced portions of it. I, of course, was here for the testimony and recall what transpired. The instruction, which I sua sponte gave on page 202, line 17 through 23, was prompted specifically by the line of questioning that began with the question that referenced the witness occasionally testifying as an expert witness. In striking that, or sustaining the objection, I felt the need to give a curative instruction with 201, line 15 through the end of line 24 -- or rather, striking and redacting through line 14, the curative instruction in this portion is no longer necessary, no longer makes sense. I would never have given it at that point in the absence of a request at that point but for what I perceived to be a misleading line of questioning.

In striking and redacting the offending questions, I am also taking out the curative instruction which was addressed to those offending questions. That's my ruling.

MS. HARRIS: Your Honor, that's fine. I just want to note for the record that I think the government had actually elicited, in the beginning of the direct, that he did testify as an expert on prior occasions, but we understand.

THE COURT: Well, the reality is, I heard the questioning, there was not an objection when the government elicited whatever they elicited, there wasn't an objection when the defense elicited. I thought it was improper, and I gave the curative instruction. That's what happened. It was directed to that line of questioning. That's my ruling.

Where else are we? Is there any other disagreement?

MS. HARRIS: There is, your Honor. At the end of the testimony, page 206, there is an instruction that your Honor gave based principally on some of the in limine issues we had raised earlier in the case about Mr. Hirst not being an investment advisor. That instruction was subsequently clarified again on the following day. So page 206, lines 2 through 6, and then, because of the possibility of the double negative, your Honor clarified that again on September 14th, page 296 to 297, beginning online 23 on 296.

THE COURT: Yes. The jury has asked for the testimony of Mr. Laby. This instruction was given after Mr. Laby had concluded his testimony and after Mr. Blais on redirect said, "No further questions," and the Court said, "You may step down, Professor. Witness excused. You may call your next witness," and the government called Marshall Manley.

At that point, a sidebar was given and an instruction was given. The instruction was not prompted by anything that occurred specifically with regard to Laby, and it was something that was indeed requested before the trial began and before Mr. Laby testified, is my recollection.

MS. HARRIS: Your Honor, it's specifically related because he testified right at the end of his testimony about the duties of investment advisors, then went on for several pages about what the fiduciary relationships or the obligations to the clients. We anticipated that in our in limine motions, and it was because of his specific --

THE COURT: Under that rationale, why shouldn't I give my instruction on other issues? Witness credibility? Why shouldn't I give the jury a witness credibility instruction along with Mr. Laby's testimony?

MS. HARRIS: Your Honor, it's --

THE COURT: How you size up a witness to tell whether they're telling the truth?

MS. HARRIS: The reason why we're particularly in this one narrow issue, your Honor, is because of the way Mr. Laby testified, obviously, which he was credentialed as only a summary witness, and then he described investment advisor responsibilities, which relate only to individuals, not Mr. Hirst.

THE COURT: Did he mention Regulation S?

MS. HARRIS: He did, your Honor.

THE COURT: Why shouldn't I send back an instruction on Regulation S, as well?

MS. HARRIS: Right. I mean, they had obviously -- and that's part of the jury charge that they do already have, your Honor, with them in the jury room. So this request was prompted because of a Rule 403 concern with respect to specific portions of his testimony. If they hear it again, the investment advisor, we think it's helpful to remind them that he's not an investment advisor. It's not a disputed fact, it's not controversial, and that's our request.

THE COURT: Let me hear from the government.

MS. MERMELSTEIN: We agree with your Honor that we're trying to respond to what the jury had asked for, and the instruction that was given is not included in what the jury has asked for. The witness doesn't even mention Mr. Hirst. So to give that piece of the instruction seems not particularly necessary and so we don't think it's appropriate to send it back.

THE COURT: I agree. It's has not been requested by the jury. As you correctly point out -- well, the argument was made that the instruction that was given at page 206 had a double negative. First I said, at 206, "I instruct you there is no issue in this case that Mr. Hirst is not an investment advisor, registered or otherwise." Then I believe I cleaned it up right there by saying, "so there is no contention and there is no dispute that he is not an investment advisor."

Focusing on the first sentence, but not the second, I was asked to cure the double negative, which had already been cured. That was done on another day at another time; is that correct?

MS. HARRIS: That's correct, your Honor.

THE COURT: All right. So I suppose what you'd like me to do is what? Give the instruction that you urged to me was wrong, though it was corrected right then and there, or you want something I gave the next day? Tell me.

MS. HARRIS: I think just the one you gave the next day, which relates back to his testimony, would be our request.

THE COURT: But do you agree that it was corrected on page 206 in the second sentence?

MS. HARRIS: It may be my fault, your Honor. There's no contention that he's not an investment advisor. I'm not sure if that solves it, but I defer --

THE COURT: How would you have had me say it?

MS. HARRIS: Just the way, he's not an investment advisor, which I think was the instruction given on the second day.

THE COURT: I see. It's not prompted by Laby testimony, it's not requested in the jury instruction, and it need not be part of what goes back to the jury.

Let's get this done and get it in the hands of the jury. Where does the preparation of the testimony stand?

MS. MERMELSTEIN: We provided the agreed-upon redactions to Ms. Sheinwald and we just emailed your Honor's ruling so she should be bringing up the redacted copy as soon as she finishes printing.

THE COURT: I take it she's in the building.

MS. MERMELSTEIN: Yes, on the fifth floor, your Honor.

THE COURT: Any objection to the transcript being delivered to the deputy Marshall to go into the jury room if there is agreement that it is in compliance with the Court's ruling?

MS. MERMELSTEIN: No, your Honor.

MS. HARRIS: No, your Honor.

THE COURT: Thank you very much. We are adjourned.

(Recess pending verdict)

(Jury not present)

THE COURT: Ladies and gentlemen, I propose to bring the jury in just to discharge them for the day. All right? I'll have them come back tomorrow morning.

Bring our jurors in, please.

(Jury present)

THE COURT: Good afternoon, ladies and gentlemen. It's wonderful to see you. I missed you. Missed seeing you and seeing your smiling faces.

Ordinarily, jurors can work later hours. I'm going to send you home now because I need to be here while you're deliberating, and if you take a look for a moment in the back of the courtroom, there's an oil portrait of someone. That man's name is Kevin Thomas Duffy, and I was his law clerk 41 years ago. I worked for him for two years.

On September 30th, he is retiring as a judge of this court after 44 years and 55 years of federal public service, and we're having a dinner in his honor tonight, and I'm speaking at that dinner, so I'm going to send you home with the instructions:

Do not discuss the case with anyone, do not do any internet communications, emails, blogging, social media posting, anything like that, and you do not do any research of any sort.

Tomorrow morning, you come in the regular time. Is the regular time the right time for everybody?

JURORS: Yes.

THE COURT: Let's not change anything in that regard. When all 12 of you are present, but not before, then you may resume deliberations. When all 12 of you are present, flip the light on so that we know. That's essentially it.

One other piece of guidance. Would the foreperson please raise their hand? Sir, I'm just going to ask that you sign your notes when they come out.

FOREPERSON: Got it.

THE COURT: That's the only thing. Thank you very much. See you back in action tomorrow.

(Adjourned to September 28th, 2016, at 10:00 a.m.)